Supreme Court, U.S.
FILED
MAR 17 2010
OFFICE OF THE CLERK
William K. Suter, Clerk

106 D

NO. 10-147

UNITED STATES SUPREME COURT

October Term, 2009

IN THE MATTER OF TBYRD ENTERPRISES, LLC,
Debtor.

THOMAS G. WAYLAND,
Petitioner

V.

U. S. TRUSTEE CHARLES F. McVAY,
Respondent

On Petition For Writ of Certiorari to The United States Court of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

THOMAS G. WAYLAND
1630 N. 10th
McAllen, Texas 78501
Tel. (956) 682-3443
Fax. (956) 630-0275

PRO SE PETITIONER

QUESTIONS PRESENTED

1. Did the U.S. Court of Appeals err in affirming the judgment of the district court because by allowing a bankruptcy court to exercise subject matter jurisdiction within the exclusive domain of a district court, the bankruptcy system has operated in an unconstitutional manner in violation of the holding of Northern Pipeline Const. Co. v. Marathon Pipeline Co., 458 U.S. 50, 71, 102 S.Ct. 2858, 2871, 73 L.Ed.2d 598 (1982)?

2. Did the U.S. Court of Appeals err in affirming the judgment of the district court because a bankruptcy court may not act beyond its jurisdiction?

3. Did the U.S. Court of Appeals err in affirming the judgment of the district court

because the failure of the Respondent to file a notice of cross-appeal complaining of the bankruptcy court's failure to impose civil sanctions prevented remand of the case?

PARTIES TO THE PROCEEDING

The following is a listing of all parties to the proceeding in the court whose judgment is sought to be reviewed:

1. Thomas G. Wayland, Respondent in the bankruptcy court, Appellant in the district court, Appellant in the Court of Appeals, and Petitioner herein.

2. U.S. Trustee Charles F. McVay, Movant in the bankruptcy court, Appellee in the district court, Appellee in the Court of Appeals, and Respondent herein.

3. Timothy W, Byrd, Respondent in the bankruptcy court, Appellant in the district court, Appellant in the Court of Appeals.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED ii

PARTIES TO THE PROCEEDING. . . iv

TABLE OF AUTHORITIES vii

OPINIONS BELOW. 1

JURISDICTION. 3

PERTINENT CONSTITUTIONAL, STATUTORY AND COURT RULE PROVISIONS 3

STATEMENT OF THE CASE. 5

REASONS FOR GRANTING WRIT. 8

CONCLUSION 15

APPENDIX 17

A. Opinion Affirming Judgment entered October 7, 2009 by United States Court of Appeals For The Fifth Circuit. 18

B. Order Denying Motion For Rehearing. 25

TABLE OF CONTENTS (Cont'd)

C. District Court Order Affirming Judgment dated 9-30-2008..... 27

D. Bankruptcy Court Memorandum Opinion of 12-07-07..... 30

E. Bankruptcy Court Order Following Remand dated 12-07-07..... 76

F. District Court Order Reversing in part and affirming in part dated 3-30-2007..... 78

G. Bankruptcy Court Memorandum Opinion dated March 13, 2006.... 82

H. Bankruptcy Court Order Imposing Sanctions Against Thomas Wayland dated March 13, 2006.... 153

I. Bankruptcy Court Order Denying Motions to Vacate dated May 17, 2006 155

J. District Court Order Denying Rehearing dated March 20, 2008.... 157

TABLE OF AUTHORITIES

Page

CASES

In re Armstrong, 304 B.R. 432 (10th Cir.BAP 2004) 11

Northern Pipeline Const Co. v. Marathon Pipeline Co., 458 U.S. 50, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982) 8,9,10

Placid Refining Co. v. Terrebone Fuel And Lube (In re Terrebone Fuel And Lube), 108 F.3d 609 (5th Cir. 1997) 11

In re Rodriguez-Anderson, 2007 WL 593582 (W.D.Tex.2007) (unpublished) 11

United States v. Coscarelli, 149 F.3d 342 (5th Cir.1998)(en banc) 7.14-15

U.S. CONSTITUTION

Art. I 9
Art. III 9,10
Art. III Section 1 3,4
Art. III Section 2 Clause 1 4,5

TABLE OF AUTHORITIES (Cont'd)

Page

STATUTES

United States Code
28 U.S.C. § 1254(1) 3

FED. RULES OF BANKRUPTCY PROCEDURE

Fed. R. Bankr. P. 9020 10

COLLIERS ON BANKRUPTCY (13th Ed.)

Colliers ¶ 9020.02[3]. 12
Colliers ¶ 9020.03 12

OPINIONS BELOW

This case originated from a bankruptcy case filed in the United States District Court For The Southern District of Texas, McAllen Division, in the case styled BFG Investments, LLC v. Texas State Bank, adversary number 05-07029. The adversary styled BFG Investments, LLC v. Texas State Bank was assigned to Bankruptcy Judge Marvin Isgur. The adversary proceeding was connected to the bankruptcy case styled In re BFG Investments, LLC, bankruptcy case no. 05-70173 in the United States Bankruptcy Court For The Southern District of Texas, McAllen Division. Bankruptcy Judge Richard S. Schmidt was assigned the In re BFG Investments, LLC bankruptcy case. The

bankruptcy case of Tbyrd Enterprises, LLC, filed in the U.S. Bankruptcy Court For The Southern District of Texas, Houston Division, was assigned to Bankruptcy Judge Marvin Isgur. After Bankruptcy Judge Isgur imposed $25,000.00 sanctions against Petitioner and others, Petitioner appealed. The district court reversed in part on the issue of the imposition of sanctions. Upon remand, Bankruptcy Judge Isgur again imposed sanctions, this time in the amount of $10,000.00 against Petitioner, and Petitioner appealed. Thereafter, the district court affirmed the order imposing sanctions against Petitioner and others. Petitioner appealed to the U.S. Court of Appeals. The Court of Appeals affirmed, and thereafter denied the Petitioner's Motion For Rehearing.

JURISDICTION

Petitioners seek review of a judgment entered by the United States Court of Appeals For The Fifth Circuit. The date of entry of the judgment was October 7, 2009. Petitioner as Appellant in the Court of Appeals filed a Motion For Rehearing on November 23, 2009, which was denied by order entered December 17, 2009.

Section 1254(1) of Title 28, United States Code, confers to the United States Supreme Court the jurisdiction to review the judgment by writ of certiorari.

PERTINENT CONSTITUTIONAL, STATUTORY, AND COURT RULE PROVISIONS

Article III, Section 1, of the U.S. Constitution states as follows:

Art. III. Section 1. The judicial power of the United States shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

U.S. Constitution, Art. III, Section 1.

Article III, Section 2, Clause 1 of the U.S. Constitution states as follows:

Art. III. Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; - to all Cases affecting Ambassadors, other public Ministers and Consuls; - to all cases of admiralty and maritime Jurisdiction; - to Controversies to which the United States shall

be a party; - to Controversies between two or more States; - between a State and Citizens of another State; - between Citizens of different States; - between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. Constitution, Art. III, Section 2, Clause 1.

STATEMENT OF THE CASE

This case originated from a bankruptcy case filed in the United States District Court For The Southern District of Texas, McAllen Division, in the case styled BFG Investments, LLC v. Texas State Bank, adversary number 05-07029.

After Respondent filed a motion for sanctions, the bankruptcy court entered an order sanctioning Petitioner in the sum of $25,000.00. Petitioner thereafter appealed to the U.S. District Court in McAllen, which reversed in part on the issue of imposition of sanctions. Upon remand, the bankruptcy court imposed sanctions against Petitioner in the sum of $10,000.00. Petitioner again appealed. On appeal, the district court affirmed the imposition of sanctions upon the Petitioner. Petitioner thereafter appealed to the United States Court of Appeals For The Fifth Circuit, which also affirmed. Petitioner filed a timely motion for rehearing, which was also denied.

In his Brief For Appellant to the United States Court of Appeals, Petitioner stated

Issues Numbers 1, 2 and 3 as follows:

1. Did the district court err in ordering remand of the case for redetermination of sanctions because it lacked jurisdiction to do so in light of the holding of United States v. Coscarelli, 149 F.3d 342 (5th Cir.1998)(en banc)?

3. Did the district court err in affirming the judgment of the bankruptcy court because the bankruptcy court did not have subject matter jurisdiction?

5. Did the district court err in affirming the judgment of the bankruptcy court because by allowing a bankruptcy court to exercise subject matter jurisdiction within the exclusive domain of a district court, the bankruptcy system has operated in an unconstitutional

manner in violation of the holding of Northern Pipeline Const Co. v. Marathon Pipeline Co., 458 U.S. 50, 71, 102 S.Ct. 2858, 2871, 73 L.Ed.2d 598 (1982)?

Brief For Appellant, p. xiv; p.1; p. 3; p.1.

REASONS FOR GRANTING WRIT

1. Northern Pipeline Const Co. v. Marathon Pipeline Co., 458 U.S. 50, 71, 102 S.Ct. 2858, 2871, (1982) states that "core" of federal bankruptcy power is defined as "the restructuring of debtor-creditor relations"" The core/non-core dichotomy originated in the Marathon Pipeline case. Appellants have a right to have an Article III judge hear all non-core issues, including the issue of

sanctions. By holding that the matter of sanctions was a core proceeding, the bankruptcy system is again running afoul of the Constitutionally-guaranteed right to have an Article III judge resolve non-core issues. Only by constitutional amendment can the right to an Article III judge be eliminated. By holding that the matter of sanctions is a non-core proceeding, the bankruptcy system is seeking to again do what it did prior to the Marathon Pipeline decision, namely, allowing Article I bankruptcy judges to exercise powers assigned by the U.S. Constitution exclusively to Article III judges. The opinion of the Court of Appeals in this case runs afoul of the

Petitioner's rights under the U.S. Constitution and the holding of Marathon Pipeline to have an Article III judge hear the matter. Consequently, the bankruptcy system is again operating in an unconstitutional manner, and the U.S. Court of Appeals erred in affirming the judgment of the district court.

2. Whether or not a monetary sanction imposed on a litigant is a civil or criminal contempt sanction turns upon whether or not the fine is imposed to reimburse the aggrieved party for costs arising from such misconduct. The awarding of attorney's fees incurred because of such misconduct has been

approved as a civil contempt sanction. In re Armstrong, 304 B.R. 432 (10th Cir.BAP 2004); Placid Refining Co. v. Terrebone Fuel And Lube (In re Terrebone Fuel And Lube), 108 F.3d 609, 613 (5th Cir. 1997).

In re Rodriguez-Anderson, 2007 WL 593582 (W.D.Tex. 2007) (unpublished), a district court considered the issue and held that a bankruptcy court does not have jurisdiction to impose non-compensatory sanctions.

A bankruptcy court does not have criminal contempt jurisdiction unless an act of criminal contempt was committed in the presence of the court. See Bankruptcy Rule 9020; Colliers ¶

9020.03. Otherwise, bankruptcy courts lack criminal contempt powers. See Colliers ¶ 9020.02[3].

In the case at bar, the bankruptcy court sanctioned Petitioner $10,000.00. Said sanction was not to compensate Respondent for costs or attorney's fees, The record shows that no evidence was offered by Respondent or any other party of what costs had been incurred because of Petitioner's alleged misconduct. The $10,000.00 sanction amount was lifted out of the air, and there was not based upon any testimony of costs, expenses, attorney's fees, or anything else. Therefore, the sanctions were criminal in nature. As a bankruptcy court does not

have criminal contempt jurisdiction for acts of contempt not committed in the presence of the court, the bankruptcy court lacked jurisdiction enter the sanctions award against Petitioner. The Court of Appeals therefore erred in the entry of its Opinion affirming the judgment of the district court, as the undelying action of the bankruptcy court was an imposition of criminal contempt sanctions.

3. In a prior appeal, the district court reversed in part and remanded the case back to the bankruptcy court because of Petitioner's argument that the bankruptcy court lacked jurisdiction to non-compensatory sanctions against

Petitioner.

Respondent in that prior proceeding did not complain that the bankruptcy court failed to impose civil compensatory sanctions against Petitioner. Having failed to file a notice of cross-appeal of the issue, the district court erred in remanding the case back to the bankruptcy court for relief waived by Respondent when it failed to file a notice of cross-appeal.

In United States v. Coscarelli, 149 F.3d 342 (5th Cir.1998)(en banc), the Fifth circuit held that where an appellee does not file a notice of cross-appeal, the reviewing court may not grant relief to that party. In the case at bar, neither

the U.S. Trustee nor any other party filed a notice of cross-appeal.

Therefore, the U.S. Court of Appeals erred in affirming the judgment of the district court, as the ability to obtain relief on remand for imposition of civil sanctions had been waived once the Respondent failed to file a notice of cross-appeal.

CONCLUSION

For the reasons stated herein, the United States Supreme Court should grant the Petition For Writ of Certiorari and reverse the judgment of the court below and render judgment that the U.S. bankruptcy system is operating in an unconstitutional manner, and remand with instructions that the underlying

case against Petitioner be dismissed for lack of jurisdiction, or in the alternative, reverse the judgment of the court below and remand for a new trial.

Respectfully submitted,

THOMAS G. WAYLAND
1630 N. 10th
McAllen, Texas 78501
Tel. (956)682-3443
Fax. (956)630-0275

PRO SE PETITIONER

NO. _____

UNITED STATES SUPREME COURT
October Term, 2009

IN THE MATTER OF TBYRD
ENTERPRISES, LLC,
Debtor.

THOMAS G. WAYLAND,
Petitioner

V.

U.S. TRUSTEE CHARLES F. McVAY,
Respondent

On Petition For Writ of Certiorari to The United States Court of Appeals For The Fifth Circuit

APPENDIX

THOMAS G. WAYLAND
1630 N. 10th
McAllen, Texas 78501
Tel. (956) 682-3443
Fax. (956) 630-0275

PRO SE PETITIONER

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

FILED
October 7,2009

Charles R. Fulbruge III
Clerk

No. 08-41114
Summary Calendar

IN THE MATTER OF TBYRD ENTERPRISES, LLC.

Debtor.

THOMAS G. WAYLAND; TIMOTHY W. BYRD

Appellants

vs.

U.S. TRUSTEE CHARLES F. McVAY,

Appellee

Appeal from the United States U.S. District Court for the Southern District of Texas

Before DAVIS, SMITH, and DENNIS, Circuit Judges.

PER CURIAM:*

*Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be

published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

The U.S. Bankruptcy Court for the Southern District of Texas imposed monetary sanctions on the appellants for filing a bad faith bankruptcy petition containing significant misstatements of fact. The appellants appealed to the U.S. District Court for the Southern District of Texas, which remanded to the bankruptcy court to clarify whether it had imposed the sanctions pursuant to Fed, R. Bankr. P. 9011 or on the basis of the inherent powers of the bankruptcy court. The bankruptcy court issued a second order clarifying that Rule 9011 was the basis of the sanctions. The district court affirmed that order, and the appellants appealed to this

court. The amount of the sanctions at issue is $10,000 for Thomas Wayland and $5,000 for Timothy Byrd.

"We review a district court's affirmance of a bankruptcy court's decision by applying the same standard of review to the bankruptcy court decision that the district court applied." In re Martinez, 564 F.3d 719, 725-26 (5th Cir.2009). "We thus generally review factual findings for clear error and conclusions of law de novo.." Id. at 726 (quoting In re OCA, Inc., 551 F.3d 359, 366 (5th Cir.2008))(internal quotations marks omitted). We review a bankruptcy court's decision to impose sanctions for abuse of discretion. In re First City Bancorporation of Tex., Inc., 282 F.3d 864, 867 (5th Cir.2002). "A court abuses its discretion

when its ruling is based on an erroneous view of the law or on a clearly erroneous assessment of the evidence." Id. (quoting Chaves v M/V Medina Star, 47 F.3d 153, 156 (5th Cir.1995)(internal quotation marks omitted).

The bankruptcy court clearly had a sufficient evidentiary basis for its factual conclusion that the appellants filed the bankruptcy petition in bad faith. The appellants argue that the sanctions under Rule 9011 are somehow akin to criminal contempt sanctions and that bankruptcy courts therefore lack the power to impose them, but there is no legal basis for equating the two types of sanctions. See In re DeVille, 631 F.3d 539, 552-53 (9th Cir.2004)(distinguishing between the processes and purposes of Rule 9011

sanctions and criminal contempt).

The appellants further argue that the imposition of Rule 9011 sanctions is not a "core" matter over which bankruptcy courts have jurisdiction to issue final orders under 28 U.S.C. §157. But the imposition of sanctions on litigants in a bankruptcy case is clearly a matter "arising in" such a case, 28 U.S.C. §157(b)(1), so bankruptcy courts have jurisdiction to issue such orders. See In re Memorial Estates, Inc., 950 F.2d 1364, 1370 (7th Cir.1991); cf. In re Southmark Corp., 163 F.3d 925, 930-31 (5th Cir.1999)(holding that a lawsuit alleging malpractice by an accountant in a bankruptcy case was a "core" matter within a bankruptcy court's jurisdiction).

Finally, the appellants argue that the

bankruptcy court lacked the power to impose Rule 9011 sanctions on remand because the U.S. Trustee did not cross-appeal from the original imposition of sanctions. But the bankruptcy court's decision on remand only clarified the legal basis of the sanctions the court had initially imposed (and also reduced the amount of the sanction against Mr. Wayland after he expressed remorse). No cross-appeal is needed in order to give an appellate court the power to remand for clarification of the legal basis for the imposition of sanctions. See Crowe v. Smith, 151 F.3d 217, 240 (5th Cir.1998)(vacating an order imposing sanctions under an incorrect theory, and remanding for consideration of whether sanctions could be imposed under an

alternative theory, when only the parties who were sanctioned appealed).

For the foregoing reasons, we AFFIRM the district court's judgment affirming the bankruptcy court's sanctions order.

U.S. COURT
OF APPEALS
FILED
DEC 17 2009

CHARLES R.
FULBRUGE III
CLERK

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 08-41104

In The Matter of TBYRD ENTERPRISES, LLC

Debtor

THOMAS G. WAYLAND; TIMOTHY W. BYRD

Appellants

v.

U.S. TRUSTEE CHARLES F McVAY

Appellee

Appeal from the United States District Court
for the Southern District of Texas, McAllen

ON PETITION FOR REHEARING

Before Circuit Judges DAVIS, SMITH, and DENNIS.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

ENTERED FOR THE COURT:

/s/ James L. Dennis
United States Circuit Judge

Order on pet for panel rehearing - REHG2

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
McALLEN DIVISION

IN RE:	)	CIVIL ACTION
TBYRD ENTER-	)	NUMBER
PRISES LLC	)	
Debtor	)	M-07-304
	)	
_____	)	
	)	
	)	
	)	
THOMAS G.	)	
WAYLAND and	)	
TIMOTHY W. BYRD	)	
Appellants	)	
	)	
VS.	)	
	)	
CHARLES F.	)	
McVAY, UNITED	)	
STATES TRUSTEE,	)	
Appellee	)	

JUDGMENT

Appellants Thomas G. Wayland and Timothy W. Byrd filed this case as an appeal from a decision of the United States Bankruptcy Court in Adversary No. 05-07029. The statement of the case and the facts of the case are evidenced by the record on appeal and both parties filed their briefs herein. The Court, after hearing oral argument on September 29, 2008, and after considering the pleadings on file, affirmed the decision of the United States Bankruptcy Court for the reasons stated on the record. It is, therefore.

ORDERED, ADJUDGED, AND

DECREED that the United States Bankruptcy Court's Order is hereby AFFIRMED for the reasons stated on the record.

IT IS FURTHER ORDERED that this appeal is DISMISSED.

DONE this 30th day of September, 2008, at McAllen, Texas.

/s/Ricardo H. Hinojosa
Ricardo H. Hinojosa
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE:	§	Case No.
TBYRD Enterprises, LCC,	§	06-30078-H1-11
Debtor.	§	
	§	
BFG Investments, LLC,	§	
Plaintiff	§	
	§	
v.	§	Adv. Pro.
	§	
TEXAS STATE BANK,	§	05-07029
Defendant	§	

MEMORANDUM OPINION

For the reasons set forth below, this Court's prior orders imposing sanctions will be

modified as follows:

1. No monetary sanctions will be imposed against John E. Villegas.

2. Monetary sanctions against Thomas G. Wayland will be imposed in the amount of $10,000.00, payable to the Clerk of Court.

3. Monetary sanctions against Tim W. Byrd will be imposed in the amount of $5,000.00, payable to the Clerk of Court.

History of Case

TByrd Enterprises, LLC filed a bad faith bankruptcy petition. The petition was signed by its attorney, Thomas Wayland, and by Tbyrd's owner, Tim Byrd. The petition was filed at the behest of John Villegas. On March

13, 2006, this Court issued a length memorandum opinion setting forth the salient facts and law. Substantial non-monetary and monetary sanctions were imposed against Wayland, Byrd and Villegas. The sanctions were appealed to the United States District Court.

On appeal, the district court affirmed all of the Court's factual findings. The Honorable Ricardo H. Hinojosa affirmed all of the non-monetary sanctions and reversed the monetary sanctions for further consideration by this Court.

The Court will not repeat the length findings made in the March 13, 2006 opinion.

However, certain of the facts and legal conclusions require repetition to assure that the District Court's remand order is faithfully executed:

1. All of TByrd's property was acquired by Tbyrd on the morning of the day on which it filed its bankruptcy petition.

2. TByrd's property was acquired – without Court authority, from the bankruptcy estate of BFG Investments, LLC ("BFG").

3. The automatic stay in BFG's bankruptcy case had terminated with respect to all of the property acquired by TByrd. Texas State Bank held a lien on the property. The property was scheduled for foreclosure on the

same morning that the property was transferred by BFG to TByrd and on the same morning that Tbyrd filed its bankruptcy petition.

4. The transfer of property by BFG to TByrd violated Title 18 of the United States Code. The transfer was done for the purpose of hindering and delaying BFG's secured creditor. Texas State Bank.

5. TByrd obtained all of its funds from a Mexican investor, Mr. Angel Sanchez Torres.

6. Thomas Wayland purported to serve as Tbyrd's counsel. In reality, he had discretionary control over Torres' funds and committed the funds to TByrd on behalf of Mr.

Torres. Wayland controlled $450,000.00 of Torres' funds.

7. Wayland contacted Byrd and arranged to conduct Torres' business through Byrd's corporate shell, Tbyrd. Wayland and Byrd had a prior attorney-client relationship and remained friends. At the time of the bankruptcy filing, Byrd was compensated by Wayland for performing various tasks as requested by Wayland.

8. Wayland failed to disclose his lack of disinterestedness when he attempted to serve as debtor's counsel.

9. Byrd, acting at Wayland's direction and with no knowledge of or interest in the

business, signed a $1,000,000.00 primissory note on behalf of Tbyrd, a deed of trust, and the bankruptcy petition.

10. Villegas was the principal behind BFG. He orchestrated the transfers out of BFG and insisted that Tbyrd immediately file a chapter 11 petition upon its acquisition of BFG's properties.

11. The sole purpose of the filing of Tbyrd's bankruptcy petition was to stop a planned foreclosure by Texas State Bank.

12. Each of Wayland, Byrd and Villegas violated federal criminal statutes.

13. Wayland is licensed to practice law in the State of Texas and is admitted to practice

before the United States District Court for the Southern District of Texas.

The Issues on Remand

The remand to this Court requires an examination of several issues:

1. Did the respondents act in criminal contempt of this Court's orders? If so, then this Court should certify the criminal matters to the District Court.

2. Are the monetary sanctions imposed by the Court civil or criminal?

3. May a Court impose Rule 9011 sanctions for criminal conduct that also violates Rule 9011?

4. If the monetary sanctions are civil,

what is the appropriate amount of sanctions?

1. Criminal Contempt

An individual will be held in criminal contempt "upon proof beyond a reasonable doubt of 1) a reasonably specific order; 2) violation of the order; and 3) the willful intent to violate the order." U.S. v. Hassell, 128 Fed. Appx. 411 (5th Cir. 2005)(citing United States v. Landerman, 109 F.3d 1053, 1068 (5th Cir.), modified in part on other grounds, 116 F.3d 119 (5th Cir.1997)). When the Fifth Circuit found that bankruptcy courts do not have authority to hold criminal contempt proceedings, it provided extensive instructions on the "characteristics of criminal contempt

proceedings generally." Id. at 1509. The following excerpt is useful:

> "Criminal contempt is a crime in the ordinary sense" and "in every fundamental respect"; likewise, "convictions for criminal contempt are indistinguishable from ordinary criminal convictions" and "that criminal contempt proceedings are 'criminal in their nature has been constantly affirmed'. Id. 88 S.Ct. at 1481-82 & n. 3. Criminal, unlike civil, contempt requires a willful, contumacious or reckless state of mind. See United States v. McCargo, 783 F.2d 507, 510 (5th Cir. 1986). Cf. McComb v.

Jacksonville Paper Co., 336 U.S. 187, 69 S.Ct. 497, 499, 93 L.Ed.599 (1949)(civil). Criminal contempt is denounced by 18 U.S.C. § 401, and may be punished by any term of imprisonment or amount of fine. A defendant charged with that offense enjoys the presumption of innocence, must be proved guilty beyond a reasonable doubt, and cannot be compelled to testify against himself, Gompers, 31 S.Ct. at 499, and, at least for contempts not committed in the presence of the court, has a right to counsel. Bloom, 88 S.Ct. at 1484. If a sentence to confinement in excess of six

months is to be imposed, there is a Sixth Amendment right to trial by jury. Frank v. United States, 395 U.S. 147, 89 S.Ct. 1503, 23 L.Ed.2d 162 (1969); Codispoti v. Pennsylvania, 418 U.S. 506, 94 S.Ct. 2687, 41 L.Ed.2d 912 (1974). Further, a criminal (unlike a civil) contempt prosecution for violation of a court order is " 'a separate and independent proceeding' from, and " 'is not a part of,' " the case in which the violated order was issued, and does not depend on the validity of that order or the continuation of the underlying proceedings. Bray v. United States, 423 U.S. 73, 96 S.Ct. 307,

309-10, 46 L.Ed.2d 215 (1925). See also Gompers, 31 S.Ct. at 499-502 ("Proceedings for civil contempt are between the original parties, and are instituted and tried as part of the main case. But ... proceedings ... for criminal contempt are between the public and the defendant, and are not part of the original cause.: Id at 499); Michaelson v. United States, 266 U.S. 42, 45 S.Ct. 18, 19, 69 L.Ed.2d 162 (1924); Lemon v. Krentler-Arnold Hinge Last Co., 284 U.S. 448, 52 S.Ct. 238, 240, 76 L.Ed. 389 (1932); United States v. United Mine Workers, 330 U.S. 258, 67 S.Ct. 677, 696,

91 L.Ed. 884 (1947).

In re Hipp, at 1509-10.

This Court has previously concluded that the parties engaged in criminal conduct. The criminal conduct involved the illegal transfer of property out of the BFG bankruptcy estate and the filing of the Tbyrd petition in violation of § 152(5) of Title 18. As this Court held and the District Court affirmed, the parties "knowingly and fraudulently receive[d]" a "material amount of property from a debtor after the filing of a case under title 11, with intent to defeat the provisions of title 11."

Such criminal conduct, however, does not equate to criminal contempt. In this case, none

of the Respondents have violated a reasonably specific order of the Court. Accordingly, although there has been criminal conduct, there has been no criminal contempt. This Court has referred the violation of Title 18 to the United States Attorney. The Court makes no certification to the District Court of any criminal contempt matter.

2. Classification of the Court's Sanctions

a. Rule 9011 Sanctions Not Criminal

The District Court's remand order to this Court implicitly requires this Court to determine whether Rule 9011 sanctions are criminal in nature (and thus outside of this Court's limited jurisdiction) or are civil in

nature (and thus within this Court's limited jurisdiction). The Court begins with the text of Rule 9011[1]:

> A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on

---

1 Although there are some textual differences between Federal Rule of Civil Procedure 11 and Federal Rule of Bankruptcy Procedure 9011, none of those differences are present in the portion of the rules that are quoted within this opinion.

> motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred, as a direct result of the violation. [emphasis added].

The Respondents' argument that this Court's prior sanction was criminal in nature was based entirely on the Respondent's view that any penalty payable to a Court is necessarily a criminal penalty. As set forth above, the text of Rule 11 provides that one acceptable sanction is a penalty payable to the Court.

A number of Courts have addressed whether the imposition of a Rule 11 sanction is criminal in nature. This court has reviewed extensive case law and has been unable to locate authority that holds that the imposition of a Rule 11 sanction is criminal in nature or invokes any rights attendant to a criminal matter. Moreover, the Respondents have failed to submit any such authority.

The leading Fifth Circuit case on Rule 11 sanctions is Thomas v. Capital Sec. Svcs., Inc., 836 F.2d 866 (5th Cir. 1988). Thomas was intended to provide broad based instruction to Courts within this Circuit:

As Rule 11 cases begin to emerge in the

wake of the 1983 amendments, it is apparent that courts are no longer reluctant to impose sanctions on attorneys and litigants who stray from their obligations under the rule. However, Rule 11 decisions by courts have not always been consistent, producing confusion among the bench and bar, as well as inequitable results. By our opinion today, we seek to ameliorate this confusion and modify existing inequities to the extent possible by clarifying some of the more important issues presented by the application of Rule 11 in this case.

Id. at 871.

One of the important teachings of Thomas is that a trial judge should use flexibility in determining an appropriate sanction. Thomas rejects a former decision by the Fifth Circuit that required findings and conclusions in all Rule 11 cases. Instead, Thomas adopted a flexible approach that requires findings and conclusions that are sufficient to create an appellate record and that commensurate with the seriousness of the Rule 11 issues. "Like a sling scale, the degree and extent to which a specific explanation must be contained in the record will vary accordingly with the particular circumstances of the case,

including the severity of the violation, the significance of the sanctions, and the effect of the award." Id. At 883.

The Fifth Circuit's flexible approach is wholly inconsistent with the approach required in the context of a criminal proceeding as set forth in Hipp. A number of Circuits have considered – and rejected – the approach suggested by Respondents. Among them are the Ninth (In re DeVille, 361 F.3d 539 (9th Cir. 2003) (holding that a bankruptcy court's imposition of a monetary Rule 11 penalty was not the equivalent of a criminal contempt proceeding); the Tenth (Eisenberg v. Univ. of New Mexico, 936 F.2d 1131, 1137 (10th Cir.

1991)(holding that criminal contempt procedures were applicable under Rule 11 for the imposition of monetary sanctions); and the Eleventh (Donaldson v. Clark, 819 F.2d 1551, 1558 (11th Cir. 1987) (same).

Following Thomas, the Fifth Circuit has repeatedly been asked to expand the procedural protections afforded under Rule 11 – and has consistently refused such expansion. For example, the Fifth Circuit has refused to expand the notice requirements beyond those contained in Rule 11 and found that "due process does not require that notice be given to the offending party in every instance before a court can impose a sanction under Rule 11."

Harmony Drilling v. Kreutter, 846 F.2d 17, 19 (5th Cir. 1998). Only limited notice and an opportunity to be heard are required before the imposition of Rule 11 sanctions. Veillon v. Exploration Svcs., Inc., 876 F.2d 1197 (5th Cir. 1989). No elaborate or formal hearing is required. In re Spiller, 919 F.2d 339, 347 (5th Cir. 1990).

This Court recites the Fifth Circuit's teachings concerning Rule 11 sanctions merely for the purpose of explaining why this Court has concluded that Rule 11 sanctions are civil rather than criminal in nature. Although not required by the Fifth Circuit, the Respondents in this case had extensive notice of the

sanctions issue, a full opportunity to respond, and an extended evidentiary hearing. Due process abounded to a much greater extent than required. The District Court has not affirmed all of the findings made by this Court.

b. Sanctions Based on Prior Conduct and Payable to the court are not Per Se Criminal Sanctions.

Wayland, Byrd and Villegas argue that any sanction imposed for past behavior and payable to this Court, is, by definition, a criminal sanction. They rely on a single case for that proposition. The case is a well reasoned and thoughtful opinion by the United States District Court for the Western District of Texas. In re Rodriguez, No. 05-55166-LMC,

2007 WL 593582 (W.D.Tex. Feb. 20, 2007). A careful reading of the Rodriguez opinion does not support Wayland, Byrd and Villegas' position. To be sure, Rodriguez set aside a sanction that was payable to the clerk and that was issued for past conduct. Id. However, the sanction was reversed because the Bankruptcy Judge relied on his inherent authority to punish past conduct when the statute provided a specific, alterative mechanism for the relief. Id. The offending conduct in Rodriguez was the violation of an 11 U.S.C. § 110 injunction barring continued violations of the non-attorney petition preparer requirements of the Bankruptcy Code. Indeed, the Court in

Rodriguez gives instructions to bankruptcy courts facing the same situation. Id. at *16. The Court instructed that future sanctions could be imposed and could be payable to the Court. However, the Court cautioned that the sanctions must be imposed pursuant to § 110 of of Title 11 rather than pursuant to the Court's inherent authority. Id. At *17. The District Court found that the proper remedy for violation of a § 110 injunction was to certify a matter to the District Court for a criminal contempt hearing. Id. at *16-17. However, the District Court also wrote the following:

> As an alternative to certification, the Bankruptcy Court may impose $500 fines

> on these recidivist contemnors pursuant to section 110(I)(1), which may be trebled pursuant to section 110(I)(2). . . . The Bankruptcy Court may also use section 110(I) as a vehicle for punishing contempt of its section 110(j) injunctions.

Id. at *17.

Accordingly, the Rodriguez court approved imposition of a fine by the Bankruptcy Court. The fines approved by the District Court were payable to the United States trustee and made available for enforcement activity by the United States trustee. 11 U.S.C. § 110(l)(4).

This Court notes that in this case, like

Rodriguez, it appears there are alternatives to the utilization of the Court's inherent authority. To that effect, the Court analyzed each major transgression separately to determine whether an exercise of the Court's inherent authority in this case would be inconsistent with Rodriguez. The summary of the Court's conclusion is as follows:[2]

Transfer of Property from BFG estate (all Respondents):

Violates Rule 9011? No

Criminally Contemptuous? No

---

2 Please note that in the original text, a table is used to list this information; unfortunately, due to spacing the table could not be reproduced here, so the information is instead presented in full with repeated insertion of the four categories analyzed by the Court.

Part of Actions that violate Title 18? Yes

Appropriate Use of Inherent Authority – No Other Remedy Available? No.

Filing of Chapter 11 Petition by TBYRD (Wayland and Byrd):

Violates Rule 9011? Yes

Criminally Contemptuous? No

Part of Actions that violate Title 18? Yes

Appropriate Use of Inherent Authority – No Other Remedy Available? No.

Filing of Chapter 11 Petition by TBYRD (Villegas):

Violates Rule 9011? No

Criminally Contemptuous? No

Part of Actions that violate Title 18? Yes

Appropriate Use of Inherent Authority –

No Other Remedy Available? No.

Orchestration of Chapter 11 Filing by Tbyrd (Villegas):

Violates Rule 9011? Yes

Criminally Contemptuous? No

Part of Actions that violate Title 18? Yes

Appropriate Use of Inherent Authority –

No Other Remedy Available? No.

As set forth above, all of the Respondents effected the unauthorized transfer of the real estate from BFG to TBYRD. This transfer did not violate any court order. It did not involve the filing of a paer with the Bankruptcy Court

or other actions that invoke Rule 9011. For the reasons set forth in the original Memorandum Opinion, the transfer did violate Title 18. Inasmuch as an appropriate remedy exists in the criminal statutes, this Court will not utilize the Court's inherent power to sanction the parties for this conduct.

There is no question that the filing of the chapter 11 petition was done in bad faith in violation of Rule 9011. The reasons why this Court determined the filing to be in bad faith, which were affirmed by the District Court, are patent. This conduct was directly undertaken only by Wayland and Byrd. Although Villegas orchestrated the filing of the bad faith petition,

he neither signed the petition nor presented it to the Court. The filing and orchestration of the chapter 11 petition were also part of the conduct that violated Title 18, but the conduct did not violate any Court order. Accordingly, because the availability of Rule 9011 and title 18, the Court will not utilize the Court's inherent power to sanction the parties for this conduct.

3. Rule 9011 Sanctions May be Imposed for Criminal Conduct that Also Violates Rule 9011

Byrd and Wayland violated both Rule 9011 and Title 18. Therefore, the Court must examine whether a Court may impose monetary sanctions for a Rule 9011 violation if

that violation was a simultaneous violation of the criminal law? For reasons set forth below, the Court concludes that a Court may impose Rule 9011 sanctions in such an event.

The Supreme Court addressed whether the imposition of civil sanctions by the Offic eof Comptroller of Currency precluded a later criminal indictment arising out of the same conduct. Hudson v. U.S., 522 U.S. 93 (1997). The Court concluded that it was appropriate to impose civil sanctions – payable to the government – and to follow the civil sanctions with a criminal prosecution for the same conduct. Id. The following excerpts from Hudson explain that the imposition of civil

sanctions is not inconsistent with a later criminal prosecution:

> [T]he conduct for which OCC sanctions are imposed may also be criminal (and in this case formed the basis for petitioners' indictments). This fact is sufficient to render the money penalties and debarment sanctions criminally punitive, Ursery, supra, at 292, 116 S.Ct., at 2149, particularly in the double jeopardy context, see United States v. Dixon, 509 U.S. 688, 704, 113 S.Ct. 2849, 2860, 125 L.Ed.2d 556 (1993)(rejecting "same-conduct" test for double jeopardy purposes). Finally, we recognize that the

imposition of both monetary penalties and debarment sanctions will deter others from emulating petitioners' conduct, a traditional goal of criminal punishment. But the mere presence of this purpose is insufficient to render a sanction criminal, as deterrence "may serve civil as well as criminal goals." Ursery, 518 U.S., at 292, 116 S.Ct., at 2149; see also Bennis v. Michigan, 516 U.S. 442, 452, 116 S.Ct. 994, 1000, 134 L.Ed.2d 68 (1996)("[F]orfeiture ... serves a deterrent purpose distinct from any punitive purpose"). For example, the sanctions at issue here, while intended to

> deter future wrongdoing, also serve to promote the stability of the banking industry. To hold that the mere presence of a deterrent purpose renders such sanctions "criminal" for double jeopardy purposes would severely undermine the Government's ability to engage in effective regulation of institutions such as banks.

Id. at 105.

With respect to the issue at hand, this Court discerns no distinction between the imposition of civil sanctions by the OCC and the imposition of Rule 9011 sanctions by this Court. In Hudson, the OCC had imposed civil

penalties of $100,000 against one individual and $50,000 against the other two. Id. at 97. The three plaintiffs in Hudson settled the civil penalties with a consent order and actually paid civil penalties to the OCC of $16,500, $15,000 and $12,500 each. Id. at 97. They were then criminally prosecuted. Id.

The principles in Hudson are applicable in a Rule 11 context. The Eight Circuit applied Hudson when it affirmed the disbarment of an attorney following the imposition of Rule 11 sanctions against counsel. In re Caranchini, 160 F.3d 420 (8th Cir. 1998). This Court agrees. The mere fact that an attorney engages in criminal conduct should not lessen

this Court's authority to regulate the conduct of counsel appearing before it. Indeed, the Caranchini Court adopted the reasoning utilized by the Pennsylvania Supreme Court in a similar situation, holding as follows:

> We are persuaded on this issue by the practical reasoning in Office of the Disciplinary Counsel v. Campbell, 463 Pa. 472, 345 A.2d 616, 621 (Pa. 1975). The Campbell court states that, "[i]f disciplinary actins were viewed, for constitutional purposes, as placing an individual in jeopardy, an attorney who was convicted of a crime could not be disbarred for the crime .... the state

> would be compelled to have in its midst an uncensured attorney who is a convicted criminal. Id.

Id. at 424.

At oral argument, the United States trustee agreed that this Court has authority to impose civil sanctions under Rule 9011 that are payable to the Court. Wayland and Byrd argue that civil sanctions payable to the Court under Rule 9011 are necessarily criminal in nature. The imposition of a monetary sanction, payable to the clerk of the Court, against a member of the bar for his conduct before this Court, is not a matter of criminal contempt. U.S. v. Alves, 136 Fed. Appx. 616 (5th Cir. 2005)(affirming

monetary sanction imposed by District Court for counsel's failure to appear and find that the imposed sanction did not amount to a finding of criminal contempt). Moreover, Wayland and Byrd are unable to reconcile their position with the plain language of Rule 9011. As set forth above, the Rule provides, in relevant part, as follows:

> A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a

> nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

FED. R. BANK. P. 9011[c](2) [emphasis added].

The language is plain. Rule 9011 sanctions may be imposed to deter conduct and may be payable to the Court.

4. Amount of Sanctions

Based on the foregoing, the Court concludes that no sanction will be imposed

against Villegas. Villegas did not violate Rule 9011. Therefore, this Court's sole power to sanction Villegas arises from its inherent authority. Because Villegas' conduct also violated federal criminal statutes, pursuant to Rodriguez, the Court will not utilize the Court's inherent authority.

The Court finds, however, that Rule 9011 sanctions are appropriate against Byrd and Wayland. The Court further concludes that the Rule 9011 sanctions are civil in nature. The District Court must determine the appropriate monetary sanctions, if any.

At the hearing conducted on September 18, 2007, the Court heard testimony from

several witnesses, including Byrd and Wayland. Both Byrd and Wayland expressed regret for their conduct. However, the Court concludes that Byrd's expression of remorse was insincere. Byrd completely failed to gasp his own wrongdoing. He apparently decided to express remorse, only because such expressions are expected in a sanctions hearing. He had no comprehension of his own conduct or why it was wrong. Meaningful remorse would require a sufficient amount of inquiry to assure that one did not repeat the wrongful conduct. Inasmuch as Byrd had failed to even attempt to understand why his conduct was being questioned, the Court rejects his expression of

remorse. His future conduct will not be deterred in the absence of a monetary sanction. The Court imposes monetary sanctions against Byrd to assure that he will finally inquire as to why huis conduct was wrong. The Court originally imposed a $5,000 sanction against Byrd. Given his financial situation, that is a substantial sanction. It is imposed solely for his conduct that violated Rule 9011. It is necessary for deterrence. No adjustment is appropriate.

Wayland also expressed remorse, but his expression was more sincere. The Court is presuaded that Wayland has taken this matter seriously and that he is unlikely to repeat the

conduct. Sanctions against Wayland are imposed solely pursuant to Rule 9011. The purpose of sanctions against Wayland is to deter future conduct by attorneys from violations of Rule 9011. The Court previously imposed a $25,000 sanction against Wayland. At the September 18, 2007 hearing, Wayland requested that this Court reduce the sanction against him from $25,000 to $10,000. The Court finds that request reasonable and a bona fide acceptance of responsibility, assuming that it is carried to fruition. The Court is aware that a State Bar Disciplinary proceeding has been commenced against Wayland arising out of his conduct in this case. That proceeding

along with a $10,000 sanction is sufficient to deter others who are similarly situated.

Separate orders will be issued.

Signed at Houston, Texas on November 30, 2007.

/s/Marvin Isgur
MARVIN ISGUR
United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE:	§	Case No.
TBYRD Enterprises, LCC,	§	06-30078-H1-11
Debtor.	§	
	§	
BFG Investments, LLC,	§	
Plaintiff	§	
	§	
v.	§	Adv. Pro.
	§	
TEXAS STATE BANK,	§	05-07029
Defendant	§	

ORDER FOLLOWING REMAND

Within 20 days of entry of this order,

Mr. Wayland shall pay $10,000 to the Clerk of the Court and provide a copy of the receipt for such payment to the United States Trustee, C/O Steve Statham.

Signed at Houston, Texas, on November 30, 2007.

/s/Marvin Isgur
MARVIN ISGUR
United States
Bankruptcy Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
McALLEN DIVISION

BFG INVEST-MENTS, LLC	)	CIVIL ACTION
VS.	)	M-06-087
TEXAS STATE BANK	)	

JUDGMENT

Appellants Thomas G. Wayland and Timothy W. Byrd raise twelve issues and Appellant John E. Villegas raises eight issues in this appeal regarding the actions and rulings of the United States Bankruptcy Court

in entering a memorandum opinion and order in Adversary No. 05-07029, styled BFG Investments, LLC v. Texas State Bank, and in Bankruptcy Case No. 06-30078-H1-11, styled In re Tbyrd Enterprises, LLC.

The statement of the case and the facts of the case are evidenced by the record on appeal and all parties filed their briefs herein. The Court, after hearing oral argument on March 23 and 29, 2007, and after considering the pleadings on file, has determined for the reasons stated on the record that the Bankruptcy Court's actions and rulings which are the subject of appeal should be affirmed with one exception. This Court determines

that the portion of the order assessing monetary sanctions against Appellants should be reversed and remanded so that the bankruptcy court may assess what, if any, civil contempt monetary sanctions it may find appropriate and/or to certify to the United States District Court, if it deems necessary, any criminal contempt issue for consideration. It is, therefore,

ORDERED, ADJUDGED AND DECREED that the United States Bankruptcy Court's Order is hereby AFFIRMED except that the monetary sanctions imposed on Appellants are hereby REVERSED and REMANDED for further action consistent with

this Court's ruling to the United States Bankruptcy Court for the Southern District of Texas.

The Clerk shall send a copy of this Judgment to counsel for the parties.

DONE this 30th day of March, 2007, at McAllen, Texas.

/s/Ricardo H. Hinojosa
Ricardo H. Hinojosa
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE:	§	Case No.
TBYRD Enterprises, LCC,	§	06-30078-H1-11
Debtor.	§	
	§	
BFG Investments, LLC,	§	
Plaintiff	§	
	§	
v.	§	Adv. Pro.
	§	
TEXAS STATE BANK,	§	05-07029
Defendant	§	

MEMORANDUM OPINION REGARDING SANCTIONS AGAINST TIM W. BYRD, THOMAS G. WAYLAND, JOHN E. VILLEGAS, AND KELLY K. McKINNIS

For the reasons set forth below, this Court finds that Tim W. Byrd, Thomas G. Wayland, John E. Villegas, and Kelly K. McKinnis must be sanctioned.

On January 25, 2006, the United States Trustee filed its motion to show cause in the Tbyrd bankruptcy case. On Ferbraury 8, 2006, this Court issued its show cause order. At the hearing on February 8, 2006, the parties stipulated that notice of the scheduled March 8, 2006 hearing was adequate. On March 8, 2006, the Court conducted an evidentiary hearing on whether sanctions should be issued.

Having fully considered the evidence

against the parties, the Court concludes that it must issue sanctions against the parties. In addition, the Court concludes that it has several independent duties that are invoked as a consequence of the evidence adduced on March 8, 2006. First, the Court must meet its criminal referral duty to the United States Attorney that is imposed by 18 U.S.C. § 3057(a). Second, the Court must report Mr. Wayland's conduct and Mr. McKinnis'[1] conduct to the State Bar of Texas pursuant to Rule 8.03

---

1 As set forth in more detail below, the Court ultimately concludes that Mr. McKinnis' conduct must be reported to the appropriate governing officials, but the Court does not recommend that any further action be taken with respect to Mr. McKinnis.

of the Texas Disciplinary Rules of Professional Conduct. Third, the Court must report Mr. Wayland's conduct and Mr. McKinnis' conduct to the District Court pursuant to Rule 5 of the Rules of Disciplinary Procedure of the United States District Court of the Southern District of Texas.

Overview and Summary of Findings

Bankruptcy cases are unique from other types of federal litigation. One of the most important events in a bankruptcy case is the filing of the petition. Unlike a civil complaint that requests relief after consideration by the Court, the filing of a bankruptcy petition results in two forms of automatic relief. First,

the filing of the petition constitutes the entry of an order for relief. 11 U.S.C. § 301. Second, the filing of the petition by an eligible entity invokes the automatic stay – a congressionally imposed injunction. 11 U.S.C. § 362(a).

If a bankruptcy petition is filed in bad faith, it nevertheless invokes the powers of the congressionally imposed automatic stay. Accordingly, the misuse of bankruptcy petitions is an extraordinarily serious issue. Indeed, when Rule 9011 of the Federal Rules of Bankruptcy Procedure was amended in 1997 to provide a "safe harbor" comparable to the safe harbor under Rule 11 of the Federal Rules of Civil Procedure, no safe harbor was granted for

the filing of a bankruptcy petition in violation of the rules. FED. R. BANK. P. 9011(C)(1)(A).

BFG Investments, LLC ("BFG") filed chapter 11 bankruptcy on March 1, 2005. Its principal secured creditor was Texas State Bank. On April 11, 2005, an agreed order was issued by the Bankruptcy Court[2] providing for the termination of the automatic stay if certain conditions were not satisfied. The agreed order was modified on several occasions. Texas State Bank subsequently notified BFG of an alleged default of the order's required conditions.

BFG challenged the accuracy of the

---

2 The Bankruptcy Judge in BFG's main bankruptcy case is the Honorable Richard Schmidt.

alleged default by commencing a state court lawsuit against Texas State Bank. The state court issued a temporary restraining order. Texas State Bank removed the state court lawsuit to this Court. Following the expiration of the state court temporary restraining order, Texas State Bank posted all of BFG's property for a state-law foreclosure sale to be conducted on January 3, 2006. On December 29, 2005, BFG sought injunctive relief from this Court. The Court conducted a hearing on December 30, 2005 and issued an agreed temporary restraining order. The agreed temporary restraining order expired by its own terms at the conclusion of the preliminary injunction

hearing that was scheduled for 8:30 a.m. on January 3, 2006.

On January 3, 2006, this Court declined to issue the preliminary injunction.

Immediately following the preliminary injunction hearing, Tbyrd Enterprises, LLC ("TByrd") filed a chapter 11 bankruptcy petition, claiming to be the owner of all of BFG's property.

Burden of Proof

At the commencement of the evidentiary hearing on this matter, the United States Trustee suggested the burden of proof was on the respondents in a show cause hearing. Nevertheless, the parties agreed that the

hearing would begin with the United States Trustee establishing his case-in-chief.

Although a show cause hearing purports to command a respondent to "show cause," the title of the order setting hearing should not control the substance of the hearing. The Fifth Circuit has long held that "the caption on a pleading does not constrain the court's treatment of a pleading." North Alamo Water Supply Corp. v. City of San Juan, Tex., 90 F.3d 910, 918 (5th Cir. 1996). The relief sought in a pleading "should be determined by substance, not a label." Edwards v. City of Houston, 78 F.3d 983, 995 (5th Cir. 1996)(quoting Bros. Inc. v. W.E. Grace Mfg. Co., 320 F.2d 594, 606 (5th

Cir. 1963)); see also Armstrong v. Capshaw, Gross & Bowers, LLP, 404 F.3d 933, 936 (5th Cir. 2005). Further, Rule 8(f), made applicable to the present proceeding through Rule 7008, states: "[a]; pleadings shall be so construed as to do substantial justice." FED. R. CIV. P. 8(f); FED. R. BANKR. P. 7008.

To be sure, in some show cause hearings, the burden of proof may be on a respondent. For example, if a respondent has admittedly not complied with a court order, the respondent may claim that compliance is impossible. Because impossibility of performance is an affirmative defense, the burden of proof would be on the respondent.

That is not the situation presently before the Court. This is a traditional show cause hearing in which complex facts must be considered. The burden of proof rests on the United States Trustee. See Sealed Appellant 1 v. Sealed Appellee 1, 211 F.3d 252 (5th Cir. 2002).

The allegations made in this case are extraordinarily serious. The Court has considered – and in certain instance recommends – severe sanctions. Given the nature of the conduct and remedies considered by the Court, the Court concludes that the United States Trustee must meet his burden by a clear and convincing standard. As the

Fifth Circuit held in Crowe v. Smith, 261 F.3d 558 (5th Cir. 2001):

> In attorney suspension and disbarment cases, the finding of bad faith must be supported by clear and convincing proof. See Thalheim, 853 F.2d at 389 n. 9. Clear and convincing proof is a high standard, requiring more than a preponderance of the evidence. See In re: Medrano, 956 F.2d 101, 102 (5th Cir. 1992). To support a finding of bad faith, the evidence must be so direct and weighty as to leave the fact finder with a firm belief in the truth of the facts of the case. See id.

Crowe v. Smith, 261 F.3d at 563.

In this case, the Court declines to issue sanctions unless they are supported by clear and convincing evidence.

The Parties and Their Conduct

John E. Villegas

Mr. Villegas is a McAllen businessman. He invests in and develops real property. Mr. Villegas is the major equity owner in BFG Investments, LLC, and he was its chief operating officer and manager. He testified before this Court at the January 3, 2006 preliminary injunction hearing and at the sanctions hearing held on March 9, 2006.

When BFG filed chapter 11 bankruptcy

on March 1, 2006, BFG became the debtor-in-possession of the BFG bankruptcy estate. As its principal manager, Mr. Villegas served as a fiduciary to the estate. Mr. Villegas never took his fiduciary responsibilities seriously. At the injunction hearings conducted on December 30, 2005 and January 3, 2006, it became apparent that Mr. Villegas paid little heed to the agreement that BFG had made with Texas State Bank, which agreements were reflected in agreed orders issued by the Bankruptcy Court. Mr. Villegas had taken inadequate steps to insure compliance with the orders and

had allowed estate property to be uninsured.[3]

The events that give rise to the sanctions against Mr. Villegas arose after the December 30, 2005 hearing and before 10:00 a.m. on January 3, 2006. On January 2, 2006, Mr. Villegas first met with Thomas Wayland. He was introduced to Mr. Wayland by BFG's lawyer, Kelly McKinnis. The meeting with Mr. Wayland began around 10:00 p.m. on January 2, 2006. The meeting resumed at about 7:00 a.m. on January 3, 2006. The preliminary

---

3 Mr. Villegas alleges that this problem is attributable to his insurance agent. The Court expresses no view on this issue. However, it is apparent that after receiving notice from the Bank, Mr. Villegas still took no effective actions to correct the insurance problems for many weeks.

injunction hering was scheduled for 8:30 a.m. on January 3, 2006.

Sections 363(b) and [c] of the Bankruptcy Code authorize a chapter 11 debtor to enter into transactions outside the ordinary course of business only with court approval after notice and hearing. These provisions assure that transactions out of the ordianry course of business are scrutinized by the creditors of the estate and reviewed by the Court.

Notwithstanding the unambiguous requirements of § 363, Mr. Villegas deeded all of the estate's tangible assets (save and except for a small cash balance in the bank) to Tbyrd Enterprises, LLC when the meeting resumed

on January 3, 2006. No approval was sought for this transaction; Mr. Villegas did not disclose the transaction to the Court or to BFG"s creditors. Indeed, Mr. Villegas failed to even tell BFG's lawyer, Mr. McKinnis, before he executed the deed to Tbyrd. In exchange for the deed, BFG received a note, secured by a wraparound mortgage, with a face value of $1,000,000.

When he was negotiating with Mr. Wayland for the sale of the property, Mr. Villegas made Mr. Wayland commit that if the preliminary injunction hearing resulted in an unfavorable outcome, Mr. Wayland would place Tbyrd into bankruptcy in order to stop the

pending foreclosure proceeding.

Immediately after the selling of all of the estate's assets, Mr. Villegas attended the 8:30 a.m. preliminary injunction hearing before the Court. The issue before the Court was whether a preliminary injunction should be issued in order to stop Texas State Bank from foreclosing on BFG's real estate. It is elementary that BFG, acting through Mr. Villegas, should have disclosed that it no longer owned the real estate when BFG appeared at the preliminary injunction hearing. Instead, Mr. Villegas committed perjury at the January 3, 2006 hearing. On cross examination by Texas State Bank's lawyer, he testified that the list filed by

his attorney of properties owned by BFG "is true and correct." In fact, at the time of Mr. Villegas' testimony, the list was wholly false and misleading. BFG owned none of the properties on the list; within the previous 90 minutes, Mr. Villegas had executed a deed transferring all of the properties.

At the conclusion of the January 3, 2006 hearing, the Court concluded that BFG had not provided the required insurance. This fact meant that BFG had breached the agreed order with Texas State Bank. Consequently, the Court declined to issue the preliminary injunction.

As Mr. Villegas left the United States

Courthouse after the Court declined to issue the preliminary ijunction, Mr. Villegas borrowed Mr. McKinnis' cell phone and called Mr. Wayland. Mr. Villegas demanded that Mr. Wayland place Tbyrd into bankruptcy, as previously agreed.

To be sure, Mr. Villegas denies that he ever discussed a bankruptcy filing with Mr. Wayland. The Court concludes that Mr. Villegas is again lying to the Court. Based on the credibility of the witnesses, the Court rejects Mr. Villegas' testimony.

Thomas Wayland

Mr. Wayland is a McAllen attorney, licensed to practice by the State of Texas (State

Bar No. 20989100) and admitted to practice in the Southern District of Texas (Admissions # 12189). In recent years, Mr. Wayland has suffered through both medical and personal issues. Although no details were offered into evidence, Mr. Wayland suffered a stroke and takes medication. He is recently divorced. His grandmother died in the last week of 2005, just before the events that give rise to the sanctions issue before the Court.

Mr. Wayland has not been active in bankruptcy courts. In Augsut 2005, he attended an advance bankruptcy seminar for CLE credit. However, ie was simultaneously bored and confused by the matters discussed at

the seminar.

Mr. Wayland typically represents Mexican investors wishing to invest funds in distressed businesses in the United States. On several occasions, Mr. Wayland stressed to the Court that he does not ask the source of his clients' funds, because he does not want to know the answer. The Court concludes that Mr. Wayland believes that his clients are attempting to funnel moneys from illegal operations into the United States.

The Mexican investor in the Tbyrd transaction was Mr. Angel Sanchez Torres. Mr. Sanchez Torres deposited $450,000 in certified funds wtih Mr. Wayland. Mr.

Wayland was given a power of attorney from Mr. Sanchez Torres and held complete discretion to invest the funds.

In the Tbyrd matter, Mr. Wayland served as the principal business decision maker and the sole lawyer. Accordingly, he holds primary responsibility for all of Tbyrd's conduct. Mr. Wayland acted through his power of attorney to make all decisions for Tbyrd. Those decisions included (1) buying the Tbyrd corporate shell from Mr. Byrd in the 10-days prior to the acquisition of BFG"s aassets; (2) acquiring substantially all of BFG's assets; and (3) placing Tbyrd into a voluntary chapter 11 bankruptcy case. Mr. Wayland also provided

all of the legal advice to Tbyrd with respect to these transactions.

Mr. Byrd had been Mr. Wayland's client in an unrelated case. The two became friends and Mr. Byrd began working as a consultant for Mr. Wayland. Mr. Byrd would run business operations for companies acquired by Mr. Wayland's clients, perform tasks as requested by Mr. Wayland, and generally operate as requested by Mr. Wayland.

As Mr. Wayland's foreign clients did not want to incorporate new companies for their U.S. investment activities, Mr. Wayland acquired dormant corporate shells as investment vehicles for his clients.

Accordingly, in the last few days of 2005, Mr. Wayland used his power of attorney from Mr. Sanchez Torres to acquire Tbyrd. He paid Mr. Byrd $1,000 of Mr. Sanchez Torres's funds.

On January 2, 2006, Mr. Wayland first learned that Mr. Villegas was desperate to find a buyer for BFG's real estate. Between 10:00p.m. on January 2, 2006 and 7:30 a.m. on January 3, 2006, Mr. Wayland made the decision that Tbyrd would purchase BFG's assets. Mr. Wayland called Mr. Byrd and retained him as a "consultant" in the Tbyrd matter. Mr. Wayland simultaneously forwarded a chapter 11 bankruptcy petition to Mr. Byrd and instructed him to execute the

petition. Mr. Wayland prepared the petition, listing Mr. Byrd as Tbyrd's "Managing Member." Mr. Byrd signed the petition, alleging that he held that position. In fact, Mr. Wayland was the only person with actual authority over Tbyrd.

At the same time that he learned of BFG's real estat, Mr. Waylsand learned that BFG was a chapter 11 debtor. Mr. Wayland conducted no investigation into whether the Bankruptcy Court had authorized the sale of BFG's assets. Indeed, he was aware that there was a pending preliminary injunction hearing seeking to retain the assets in the estate. Mr. Wayland and Mr. McKinnis had been friends

for many years, and Mr. Wayland knew that Mr. McKinnis was BFG's bankruptcy counsel. Nevertheless, Mr. Wayland failed to advise Mr. McKinnis that he was acquiring all of BFG's assets. Indeed, Mr. Wayland testified that he rushed to the county clerk's office to record the deed before BFG could change its mind about selling the property.

Mr. Wayland knew that he had placed the newly acquired real estate into a corporate shell with no other assets. Nevertheless, he caused BFG [sic] to file a chapter 11 petition within three hours of the time that it received the deed.

Mr. Wayland signed the chapter 11

petition as BFG's [sic] attorney. 11 U.S.C. § 327 requires that a chapter 11 debtor's counsel be "disinterested." Mr. Wayland – as the sole actor in making Tbyrd's business decision – was not disinterested. He failed to disclose his ack of disinterestedness.

Timothy Byrd

Mr. Byrd is a photographer and businessman. He was the founder of Tbyrd. As set forth above, he sold Tbyrd to Mr. Sanchez Torres in late December 2005.

In his first appearance before this Court, Mr. Byrd presented himself as merely an innocent former client who had been contacted by Mr. Wayland to sell his corporate shell.

That characterization has proven inaccurate.

Mr. Byrd and Mr. Wayland work together on a regular basis. Mr. Wayland frequently hires Mr. Byrd as a business manager and consultant. Mr. Byrd is typically paid $20.00 per hour for his time.

Mr. Byrd willingly signed Tbyrd's bankruptcy petition. He knew when he signed it that it was false. Mr. Byrd was not the Managing Member of TByrd on the date the petition was signed. Mr. Byrd – at Mr. Wayland's behest – also signed the deed of trust in which Tbyrd granted a lien to secure the $1,000,000 purchase money note. Mr. Byrd signed the $1,000,000 note.

Accordingly, in the space of a few hours, Mr. Byrd willingly executed a $1,000,000 promissory note by TByrd, a deed of trust for recording in the real property records, and Tbyrd's chapter 11 bankruptcy petition. Mr. Byrd conducted absolutely no investigation. Instead, he blindly did as instructed by Mr. Wayland.

Mr. Byrd is not so naive that he would believe that he should be executing documents of such obvious import with absolutely no investigation. He portrays himself as an innocent victim. The Court finds him to be a willing actor.

Kelly McKinnis

Mr. McKinnis is a McAllen lawyer, licensed to practice law by the State of Texas. He is admitted to practice before the United States District Court for the Southern District of Texas. Mr. McKinnis has a varied practice, including an active practice before the United States Bankruptcy Court for the Southern District of Texas. Mr. McKinnis is a sophisticated attorney who regularly appears before the undersigned judge.

Mr. McKinnis was approved to serve as BFG's counsel by order entered on April 11, 2005. BFG's bankruptcy case was converted to chapter 7 on January 5, 2006. Until the case was converted, Mr. McKinnis remained as

counsel to the debtor in possession.

In late 2005, Mr. Villegas approached Mr. McKinnis about selling the estate's assets under § 363 without a court order. Mr. McKinnis told Mr. Villegas that such an action would be illegal and that he could not do so. On further consideration, however, Mr. McKinnis changed his advise to Mr.Villegas. He informed him that, although Mr. McKinnis advised against any attempt to sell the assets under § 363 without a court order, Mr. McKinnis did not believe such an action would be illegal.

In the waning days of 2005, Mr. McKinnid put Mr. Villegas in contact with Mr.

Wayland. Mr. McKinnis knew that Mr. Wayland had clients who bought distressed assets and introduced Mr. Wayland to Mr. Villegas for thepurpose of discussing such a transaction. Prior to the 8:30 a.m. January 3, 2006 hearing, Mr. McKinnis was not informed that an agreement had been reached and was not informed that Mr. Villegas had executed documents transferring the properties.

Following the Court's denial of the issuance of the preliminary injunction, Mr. Villegas informed Mr. McKinnis of the property sale that had already occurred. Mr. McKinnis lent his cell phone to Mr. Villegas so that he could call Mr. Wayland. Mr. Villegas

instructed Mr. Wayland to file Tbyrd's bankruptcy petition.

However, Mr. Wayland's computer printer malfunctioned and he could not print the petition. Mr. Wayland begged Mr. McKinnis for assistance. Mr. McKinnis refused to help and the two had a heated exchange. Mr. Wayland implored Mr. McKinnis for assistance – arguing that the two were long-time friends, that Mr. Wayland's grandmother had just died a few days before, and that Mr. Wayland wa distraught. Mr. McKinnis relented, typed the petition, and filed the petition in the Southern District of Texas. The petition bore Mr. Wayland's signature and Mr.

Byrd's signature. But for Mr. McKinnis' conduct, the petition would not have been filed.

The Wrongful Nature of the Conduct

The Asset Transfer

The transfer of all of BFG's assets to Tbyrd without court approval violated 11 U.S.C. § 363. Mr. Villegas violated his fiduciary duty to the estate. He was assisted in these violations by Mr. Wayland and Mr. Byrd.

Mr. McKinnis gave legal advice that, although the transfer should not occur. It would not be illegal. He was correct that the transfer should not occur; he was incorrect in advising that the transfer was not illegal. Mr. McKinnis' error in the legaility of the

transaction may be actionable and may justify the denial of his fees in BFG's bankruptcy case.[4] However, it does not give rise to a sanctions issue under Rule 9011 or the Court's inherent power. He advised the client of the correct ultimate course and the client declined to follow the advise. The Court will not impose a sanction for the error in legal advice.

In addition to violating 11 U.S.C. § 363, the Court also concludes that the facts described in testimony before the Court gives rise to criminal violations. 18 U.S.C. § 152(5)

---

4 The Honorable Richard S. Schmidt is presiding over BFG's main bankruptcy case. The issue of whether to award fees to Mr. McKinnis is up to Judge Schmidt.

makes it a crime to "knowingly and fraudulently receive [ ] any material amount of property from a debtor after the filing of a case under title 11, with intent to defeat the provisions of title 11." Mr. Villegas, Mr. Wayland and Mr. Byrd willfully transferred property out of BFG's bankruptcy estate with the intent to defeat the provisions of title 11. The Court had not approved the transfer and had refused to issue an injunction barring Texas State Bank from exercising its rights as a secured creditor.

The Preliminary Injunction Hearing

Mr. Villegas was an active participant in the preliminary injunction hearing. He

appeared at the hearing seeking an injunction to avoid irreparable injury to BFG. However, before the commencement of the hearing, he had transferred away BFG"s assets.

When asked about ownership of the assets, Mr. Villegas lied and claimed BFG owned the assets. Even if he had not been asked, as the fiduciary to BFG's estate, he had a duty of disclosure to the Court.

Mr. Villegas' perjury at the hearing is sanctionable. No other party is responsible for Mr. Villegas conduct at the preliminary injunction hearing.

The Tbyrd Bankruptcy Petition

The Tbyrd bankruptcy case was filed on

the 20th anniversary of the issuance of the Fifth Circuit's seminal opinion on bad faith chapter 11 bankruptcy filings. In re Little Creek Dev. Co., 779 F.2d 1068 (5th Cir. 1986).[5] During the 20 years that have passed since Little Creek, the case has become settled law. Some of Little Creek's important teachings are:

> • [T]he bankruptcy court has the power to raise the issue of good faith sua sponte as an inquiry into its jurisdiction, and former Bankruptcy Act precedent in this circuit confirms their position. See In re

---

5 Little Creek was issued by the Fifth Circuit on January 3, 1986. Tbyrd's bankruptcy petition was filed on January 3, 2006.

Metropolitan Realty Corp., 433 F.2d 676, 679 (5th Cir. 1970)(Wisdom, J.)("As soon as the lack of good faith affirmatively appeared, the district court acted properly in dismissing the petition even though the plan stage had not been reached")(citations omitted), cert. denied, 401 U.S. 1008, 91 S.Ct. 1251, 28 L.Ed.2d 544 (1971); Southern Land Title Corp. v. Mitchell, 375 F.2d 874, 877 (5th Cir. 1967). [Little Creek, 779 F.2d at 1071, n.1]

• Every bankruptcy statute since 1898 has incorporated literally, or by judicial interpretation, a standard of good faith

for the commencement, prosecution, and confirmation of bankruptcy proceedings. [Id. At 1071]

Requirement of good faith prevents abuse of the bankruptcy process by debtors whose overriding motive is to dealy creditors without benefitting them in any way or to achieve reprehensible purposes. [Id. at 1072]

• Determining whether the debtor's filing for relief is in good faith depends largely upon the bankruptcy court's on-the-spot evaluation of the debtor's financial condition, motives, and the local financial realities. Findings of lack of good faith in

proceedings based on §§ 362(d) or 1112(b) have been predicated on certain recurring but non-exclusive patterns, and they are based on a conglomerate of factors rather than on any single datum. Several, but not all, of the following conditions usually exist: The debtor has one asset, such as a tract of undeveloped or developed real property. The secured creditors' liens encumber this tract. There are generally no employees except for the principals, little or no cash flow, and no available sources of income to sustain a plan of reorganization or to make adequate protection payments pursuant to 11

U.S.C. §§ 361, 362(d)(1), 363(e), or 364(d)(1). Typically, there are only a few, if any, unsecured creditors whose claims are relatively small. The property has usually been posted for foreclosure because of arrearages on the debt and the debtor has been unsuccessful in defending actions against the foreclosure in state court. Alternatively, the debtor and one creditor may have proceeded to a stand-still in state court litigation, and the debtor has lost or has been required to post a bond which it cannot afford. Bankruptcy offers the only possibility of forestalling loss of the property. There

> are sometimes allegations of wrongdoing by the debtor or its principals. The "new debtor syndrome," in which a one-asset entity has been created or revitalized on the eve of foreclosure to isolate the insolvent property and its creditors, exemplifies, although it does not uniquely categorize, bad faith cases.[Id. at 1072-73]

The filing of the petition in this case exemplifies the worst of the bad faith cases. The debtor's corporate shell was acquired on the eve of bankruptcy. The debtor had $0.00 in capital. Within 2.5 hours of the filing of the petition, the debtor acquired all of it assets.

The debtor's recently acquired properties were posted for foreclosure at 10:00 a.m. and the petition was filed at 9:55 a.m. on January 3, 2006.1 The debtor had a straw man as its manager, no employees, and no creditors other than Texas State Bank and BFG (who held a note executed on the morning of the filing of the bankruptcy petition). The debtor's predecessor was in bankruptcy and had lost efforts to reorganize; its efforts at obtaining injunctive relief had failed. The debtor acquired its property from BFG in knowing violation of the law, The debtor is unable to produce a single book or record. The debtor's attorney (and de facto principal) testified that

the sole reason for filing the bankruptcy case was to force Texas State Bank to neogtiate.

Notwithstanding the foregoing, Mr. Wayland and Mr. Villegas decided that this bankruptcy case should be filed. Without the assistance of Mr. Byrd and Mr. McKinnis, the filing could not have occurred. The filing was in bad faith and was abusive. Its sole purpose was to achieve delay and find a away to avoid the effects of the orders issued in BFG's bankruptcy case.

The petition was filed under penalty of perjury. It falsely identified Mr. Byrd as the Managing Member of the LLC. The filing of a knowing and fraudulent oath on a bankruptcy

petition violates 18 U.S.C. § 152(3). Moreover, the filing of the TByrd petition was done for the purpose of consummating the fraudulent transfer of assets out of BFG. Accordingly, the filing of the petition violated 18 U.S.C. § 157(1).

Determination of Appropriate Sanction

In determining appropriate sanctions, the Court should limit the sanction to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. FED. R. BANKR. P. 9011[c]. In re Porceddu, – B.R. – , 2006 WL 360530, at *10 (Bankr.S.D.Tex.2006).

This Court has the inherent to regulate

the practice of litigants and lawyers appearing before it. Chambers v. NASCO, Inc., 501 U.S. 32 (1991).

The Court has examined what sanctions have been imposed by other courts. Frequently the amount of sanctions are determined by examining opposing counsel's attorneys fees. In general, the Court rejects fee shifting as the only appropriate measure of sanctions. The fees incurred by others may or may not properly measure the amount that is appropriate to deter future wrongful conduct by a party. Fox v. Acadia State Bank, 937 F.2d1566, 1571 (11th Cir. 1991). When the sanctions are imposed on the Court's own

motion, it may be inappropriate to examine the Court's own cost of operation as an appropriate measure. Blue v. United States Dep't of Army, 914 F.2d 525, 548 (4th Cir. 1990). Accordingly, the Court will examine the particulars of the conduct, the party, and the required deterrent in order to assess an appropriate sanction.

In Chambers, the Supreme Court affirmed the imposition of sanctions of $996,644, disbarment and suspension for bad faith conduct of a defense of a contract suit. Chambers, 501 U.S. at 55-58. In that case, the monetary award was based on a measure of opposing counsel's fees, but additional sanctions were added to assure proper

deterrence. In other cases, sanctions have been limited to an admonishment of counsel. However, admonishments are generally limited to situations that are substantially less egregious than the conduct before this Court. Traina v. U.S., 911 F.2d 1155, 1158 (5th Cir. 1990) (reprimand for reliance on inapplicable case law); Cargile v. Viacom Int'l, Inc., 282 F. Supp. 1316, 1320 (N.D.Fla.2003) (reprimand for filing frivolous pleading where counsel subsequently advised client to dismiss case and it was counsel's first Rule 11 violation); Miller v. Norfolk So. Ry. Co., 208 F. Supp. 2d 851, 854 (N.D.Ohio 2002)(reprimand for filing frivolous motion to reconsider which simply repeated

earlier arguments); Jenkins v. Methodist Hosp. of Dallas, Inc., 2004 WL 2871006, at *2 (N.D.Tex. Dec. 14, 2004)(reprimand for failure to proofread brief and correct erroneous quotation upon discovery of error).

John E. Villegas

At the show cause hearing, Mr. Villegas had an opportunity to present any evidence that he chose. His case was severely lacking. In addition to failing to defend the substance of the allegations, Mr. Villegas also failed to express amy regret or remorse for his conduct. As set forth in detail above, Mr. Villegas' conduct was substantial and abusive.

In determining the appropriate sanction,

the Court considered both monetary and non-monetary sanctions. Based on the nature of his conduct, the Court finds that neither solely monetary nor solely non-monetary sanctions would be appropriate.

Mr. Villegas claims to have no concept that what he did was wrong. Although the Court finds his conduct intentional and his testimony untruthful, it is also apparent that, even now, Mr. Villegas apparently fails to fully confront the reality of what he did. If the Court imposed only monetary sanctions, the Court believes that there is a substantial risk that Mr. Villegas would return to bankruptcy court and commit similar wrongful acts again.

Monetary sanctions alone would be insufficient. Accordingly, the Court finds that any effective deterrent against Mr. Villegas requires a form of pre-filing review.

In Mr. Villegas' case, one appropriate non-monetary sanction is to require him – permanently – to obtain advance, written approval from a United States Bankruptcy Judge or a United States District Judge before he, or any entity controlled by him (directly or indirectly) files a petition under Title 11. Such a pre-filing review will protect the Court against further invocations of the automatic stay by bad faith filings, and will allow the Court to condition any filing by an entity

controlled by him with appropriate safeguards. For example, given the breadth of his breach of fiduciary duty to the BFG case, it would allow the Court to require the immediate appointment of a trustee in a future case, if such appointment were appropriate.

The second non-monetary sanction that must be issued against Mr. Villegas is merely one that restates the law. All of BFG's property is now under control of the chapter 7 trustee appointed in BFG's bankruptcy case. 11 U.S.C. § 362(a) bars any person from exercising control of the estate's property. Section 362 serves as a congressionally imposed injunction. In re All Trac Transp.,

Inc., 306 B.R. 859 (Bankr.N.D.Tex.2004). Accordingly, Mr. Villegas is already enjoined from asserting any right to any property of BFG's estate.[6] To assure no misunderstanding, the Court explicitly enjoins Mr. Villegas. At the sanctions hearing, claims were alleged to exist against insurance agents, insurance companies, banks and others. All of those

---

6 Subsequent to the Court's January 10, 2006, order that granted Texas State Bank the ability to foreclose on its collateral and transferred possession of its collateral to Texas State Bank, Mr. Villegas sought a temporary restraining order in state court. Moreover, after Mr. Villegas sold the property to Tbyrd, he then executed an earnest money contract to sell the properties to a third party. Although these events were not the subject of the show cause order and no sanctions are issued as a consequence of these events, they are relevant to understanding Mr. Villegas' motive in this case.

rights and claims are controlled exclusively by the chapter 7 trustee. Mr. Villegas shall not commence or threaten any lawsuit or otherwise make demand against those parties with alleged liability to the estate. This injunction does not bar Mr. Villegas from asserting rights in the bankruptcy court as a party in interest in the bankruptcy case.

The non-monetary sanctions should effectively deter future wrongful conduct by Mr. Villegas, but will have little or no deterrent effect on others who are similarly situated. Given the magnitude of the wrong and the size of the assets that were controlled by Mr. Villegas, the Court requires Mr. Villegas to pay

a sanction of $25,000. This sanction is intended to be sufficient to deter others who are similarly situated from similar misconduct. The Court recognizes that the $25,000 sanction is modest, given the the conduct. Nevertheless, the purpose of the monetary sanction (in this case) is deterrence and the $25,000 should be sufficient warning to others. If the Court was authorized to punish Mr. Villegas for his conduct, the sanction would be much more severe.

In this case, given the criminal nature of the conduct, punishment should be left to the appropriate authorities. Accordingly, pursuant to 18 U.S.C. § 3057(a), this Court reports this

matter to the United States Attorney for the Southern District of Texas. The clerk shall forthwith transmit a copy of this memorandum opinion to the United States Attorney.

Thomas G. Wayland

Mr. Wayland failed to present any effective defense of his conduct at the show cause hearing. Indeed, his principal defense was to blame Texas State Bank because it refused to negotiate with him after the bad faith bankruptcy case was filed!

He also blamed the Court based on an order issued on January 10, 2006. The purpose of the January 10, 2006 hearing was to consider whether to grant relief from the

automatic stay to allow Texas State Bank to foreclose on Tbyrd's assets. The motion sought authority to foreclose on everything owned by the debtor, with the hearing set only seven days after the filing of the petition. Mr. Wayland was debtor's counsel. He failed to appear at the hearing. Instead, he advised Texas State Bank's counsel to announce that the debtor was unopposed to the relief. The Court had never before seen such a display of a lack of concern in a chapter 11 bankruptcy case. If the case had any merit whatsoever, how could debtor's counsel intentionally fail to appear at the hearing – and how could a debtor who had filed a case with good faith intent to

reorganize not oppose the relief? Confronted with that situation, the Court ordered that Texas State Bank should have immediate possession and control of its collateral. One of Mr. Wayland's principal defenses was that the January 10, 2006 order precluded any effective negotiations between TByrd and Texas State Bank.

At the sanctions hearing, Mr. Wayland seemed to take pride in the fact that he looked the other way and asked no questions about the source of his clients' money. Whether he is right or wrong about the source of his client's money, Mr. Wayland assumes that he is operating, as a money launderer for foreign

clients. How could a licensed attorney take pride in such conduct, much less express such sentiments before a United States Bankruptcy Judge in a hearing in a United States Courthouse?

The Court recites the foregoing two paragraphs so that the reader will understand just how far removed Mr. Wayland's sense of propriety is from reality. To be sure, he regrets that he is in trouble; however, he has absolutely no concept as to why he is in trouble.

Mr. Wayland is licensed to practice law in the State of Texas and in the United States District Court for the Southern District of

Texas. Given his cavalier attitude about the law, the Court cannot understand why his practice should be allowed to continue. Indeed, his conduct in this Court forfeits that privilege.

This Court has inherent authority to regulate the practice of lawyers before it. Effective immediately, Mr. Wayland is barred from representing any clients before the undersigned Judge. The Court recommends that Mr. Wayland be disbarred from practice before the United States District Court for the Southern District of Texas and that he be disbarred from the State of Texas. Accordingly, pursuant to Rule 8.03 of the Texas Rules of Professional Conduct, the clerk is

directed to provide a copy of this memorandum opinion to the State Bar of Texas. Pursuant to Rule 5 of the Rules of Discipline of the United States District Court for the Southern District of Texas, a copy of this memorandum opinion shall be provided to Chief Judge Hayden Head.

Mr. Wayland's conduct is so serious that others must b e deterred from engaging in similar conduct. Although a sanction of the magnitude imposed in chambers may be appropriate based on Mr. Wayland's conduct, the limited evidence before this Court is that Mr. Wayland is just returning to his law practice and has limited means. The least severe monetary sanction that will have any

meaning given the nature of his conduct is $25,000. Accordingly, the Court orders a $25,000 sanction.

As with Mr. Villegas, given the criminal nature of the conduct, punishment should best be left to the appropriate authorities. Accordingly, pursuant to 18 U.S.C. § 3057(a), this Court reports this matter to the United States attorney for the Southern District of Texas. The clerk shall forthwith transmit a copy of this memorandum opinion to the United States attorney.

Timothy W. Byrd

Comparatively, Mr. Byrd's conduct is less egregious than the conduct of Mr. Villegas or

Mr. Wayland. Nevertheless, Mr. Byrd is the actor who actually signed Tbyrd's bankruptcy petition. He is the one who signed the acquisition documents (i.e., the promissory note and deed of trust) to acquire the BFG assets.

Mr. Byrd was willing to sign these highly significant documents in exchange for money. He knew that he was totally unaware of the substance of the transactions and was being used as a straw man for Mr. Wayland's representation of his Mexican investors.

Mr. Byrd recently completed his own bankruptcy proceeding. He worked for Mr. Wayland for $20.00 an hour. He is of modest

means. The Court finds that even a minimal monetary sanction will deter similarly situated individuals from repeating the conduct. A $5,000 sanction is imposed.

However, Mr. Byrd continues to view himself as an innocent bystander, believing that he has done nothing wrong. He is wrong, but (like Mr. Wayland) simply does not recognize what he has done. Accordingly, for a period of three years from the effective date of the order issued against him, Mr. Byrd must obtain advance, written approval from a United States Bankruptcy Judge or a United States District Judge before he, or any entity controlled by him (directly or indirectly) files a

petition under Title 11.

Kelly McKinnis

At the sanctions hearing, Mr. McKinnis fully appreciated the gravity of his conduct. Although the Court recognizes that the allegations made against Mr. McKinnis are extremely serious, most have not been proven by clear and convincing evidence. In particular, the Court is not convinced by a clear and convincing standard that Mr. McKinnis knew or orchestrated any transfer of property out of BFG. Indeed, the Court is not convinced by a clear and convincing standard that Mr. McKinnis was aware of the transfer out of BFG until it had already occurred.

Nevertheless, the Court is clearly convinced that Mr. McKinnis knew his assistance in the filing of the Tbyrd chapter 11 petition was wrong. Indeed, he testified that he initially refused to do so, and relented when his friend made him feel guilty, As an officer of the Court, Mr. McKinnis has a duty to protect the integrity of the Court. He cannot allow the Court's integrity to be compromised when a friend needs a favor.

The Court admonishes Mr. McKinnis for his conduct and imposes a minimal sanction of $5,000 for his conduct.

Rule 8.03 of the Texas Disciplinary Rules of Professional Conduct requires the reporting

of conduct when there has been a violation of the Disciplinary Rules that "raises a substantial question as to a lawyer's honesty, trustworthiness or fitness as a lawyer in any other respects..." Similarly, Rule 5 of the Southern District's Rules of Discipline requires that this Court notify the chief judge when a lawyer has engaged in "conduct which might warrant disciplinary action." In this case, Mr. McKinnis' conduct raises serious questions. Although this Court does not make a recommendation of disbarment against Mr. McKinnis, the Court has a duty to allow appropriate authorities to investigate. Accordingly, pursuant to Rule 8.03 of the

Texas Disciplinary Rules of Professional Conduct, the clerk is directed to provide a copy of this memorandum opinion to the State Bar of Texas. Pursuant to Rule 5 of Discipline of the United States District Court of the Southern District of Texas, a copy of this memorandum opinion shall be provided to Chief Judge Hayden Head.

Orders to be Issued

The four individuals should each be given an independent right to appeal the result. Accordingly, the Court is issuing separate orders imposing sanctions against the four individuals.

Signed at Houston, Texas on March 13,

2006.

/s/Marvin Isgur
Marvin Isgur
UNITED STATES
BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE:	§	Case No.
TBYRD Enterprises, LCC,	§	06-30078-H1-11
Debtor.	§	
	§	
BFG Investments, LLC,	§	
Plaintiff	§	
	§	
v.	§	Adv. Pro.
	§	
TEXAS STATE BANK,	§	05-07029
Defendant	§	

ORDER IMPOSING SANCTIONS AGAINST THOMAS WAYLAND

For the reasons set forth in the Court's

memorandum opinion issued on this date, it is Ordered:

1. Effective upon entry of this Order, Mr. Thomas Wayland is barred from appearing before the undersigned Judge.

2. Within 20 days of entry of this order, Mr. Wayland shall pay $25,000 to the Clerk of the Court and provide a copy of the receipt for such payment to the United States Trustee, C/O Steve Statham.

Signed at Houston, Texas, on March 13, 2006.

/s/Marvin Isgur
Marvin Isgur
UNITED STATES
BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE:	§	CASE NO..
TBYRD Enter-	§	
prises, LCC, aka	§	06-30078
TIM W. BYRD,	§	
Debtor.	§	CHAPTER 11

ORDER DENYING MOTIONS TO VACATE
(Docket #90, #91, #93)

The respondents to this Court's sanctions order seek to vacate the order. In general, the respondents allege that duplicative appeals will have to occur and that the order was separately issued in a related case. With respect to the issue of duplicative appeals, this

Court may not and will not interfere with the District Court's exclusive jurisdiction over the appeal. It is true that the order was entered in the two cases and that satisfaction of the order in one case will satisfy the Court's requirements in the related case. However, the misconduct occurred in more than one case and it is appropriate that the order be entered in both cases.

Accordingly, the motions to vacate are denied.

/s/Marvin Isgur
MARVIN ISGUR
United States
Bankruptcy Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
McALLEN DIVISION

BFG INVEST-	)	CIVIL ACTION
MENTS, LLC	)	
VS.	)	M-06-087
	)	
TEXAS STATE	)	
BANK	)	

ORDER

Having come on to be considered "Appellants ' Motion For Rehearing, " (Docket Entry Number 59), "Appellants' Motion For Stay Pending Conclusion of Appeal," (Docket Entry Number 60), "Appellants' Motion to

Withdraw Reference," (Docket Entry Number 61), "Appellants' Motion For Expedited Hearing on Appellants' Motion For Stay Pending Conclusion of Appeal," (Docket Entry Number 71), "Appellants' Motion For Expedited Hearing on Appellants' Motion to Withdraw Reference," (Docket Entry Number 72), and "Appellants' Thomas G. Wayland's and Timothy W. Byrd's Second Motion For Mediation," (Docket Entry Number 75), and the Supplements to the Second Motion For Mediation (Docket Entries 76 and 77), all of which have been filed by Thomas G. Wayland and Timothy W. Byrd, and the Court, after having considered said motions and the

pleadings on file, is of the opinion that said motions should be and are hereby DENIED.

The Clerk shall send a copy of this Order to counsel for the parties.

DONE on this 20th day of March, 2008, at McAllen, Texas.

/s/Ricardo H. Hinojosa
Ricardo H. Hinojosa
UNITED STATES
DISTRICT JUDGE